Supreme Court, U. S.
FILED
JAN 2 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

L. O. WARD d/b/a
L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 7, 1979
CERTIORARI GRANTED NOVEMBER 5, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

L. O. WARD d/b/a
L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TABLE OF CONTENTS

	Page
Complete Docket Entries of United States District Court for the Western District of Oklahoma in Civil No. 76-0303..	2
Complete Docket Entries of United States District Court for the Western District of Oklahoma in Civil No. 76-0456..	7
Complete Docket Entries of United States Court of Appeals for the Tenth Circuit in No. 77-1952	11
Spill Report Form, Environmental Protection Agency (April 2, 1975)	17
Letter to Lou Ward from James J. Doyle, Director, Enforcement Division, Environmental Protection Agency (May 13, 1975)	19
Attachment A to the letter of May 13, 1975, signed by L.O. Ward and received by Environmental Protection Agency..	21
Letter to Commander J. D. Webb, Second U.S. Coast Guard, District, from Harless R. Benthul, Chief, Legal Branch, Enforcement Division, Environmental Protection Agency, Region VI (August 15, 1975)	24
Letter to Jones & Gungoll from R. A. Ratti, Chief Counsel, United States Coast Guard (February 11, 1976)	26

TABLE OF CONTENTS

	Page
Pre-Trial Order (May 9, 1977)	29
Final Judgment (September 6, 1977)	34
Excerpts from Transcript of Proceedings of May 9, 1977	41
United States Coast Guard Commandant Instruction 5922.11A	38
Order of the Supreme Court Granting the Petition for a Writ of Certiorari (November 5, 1979)	62

CIV-76-0303-E

WARD, L. O., PLAINTIFF

COLEMAN, WILLIAM J., JR., individually and as Secretary of Transportation for the United States of America;

TRAIN, RUSSELL E., individually and as Administrator of the Environmental Protection Agency of the United States of America, and

SILAR, ADMIRAL, OWEN W., individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS

Consolidated W/76-456 8-26-76

CAUSE

32 USC 1321(n); 28 USC 1331, 2201-02, 1333, 1332, 1355—Temp. & perm. Injs. restraining enforcement of statutes relating to oil pollution of inland water; and Declaratory Judg. re navigability of "Boggy Creek" in this Dist.

FOR PLAINTIFF

Stephen Jones & James H. Gungoll, P.O. Box 3339, Enid, Ok 73701 (405) 233-4321

Harold B. Scoggins, Jr., Independent Petroleum Assn. of America (Amicus Curiae)

FOR DEFENDANTS

David L. Russell, USA, Roland Campbell, III, & O. B. Johnston, III, AUSA, 4434 U.S. Cthse, OC, 231-5281

and

Bruce J. Chasan, Atty, Dept of Justice, Wash, D.C. 20530 (202) 739-2793

Earl Salo, Atty, Dept of Justice, Wash, DC 20530 (202) 739-2738

DOCKET ENTRIES

DATE	PROCEEDINGS

4-13-76 Filed Complaint

4-13-76 Filed prae for & iss'd summons

4-13-76 Filed plf's Mtn for 3 Judge Ct—ws

4-13-76 Filed plf's Brief in Sup of Mtn—ws

4-15-76 Filed Order directing dfts to respond to plf's Mtn for 3 Judge Ct w/brief, w/i 7 days herefrom in the event they or either of them desire to contest said mtn (Eubanks) ws

4-23-76 Filed Dfts' Oppo to the Mtn to Convene a 3-Judge Ct—ws

4-27-76 Filed Dfts' Mtn for Addl Time to Respond to Plf's Mtn for 3 Judge Ct. w/Order grntg a ext of 5 days to 4-27-76 to file its Response (Eubanks) ws

4-27-76 Filed Order that the plf's mtn for an order of this ct req'g the Chief Judge of the Circuit to convene a 3-judge district ct to hear this matter is conditionally denied (Eubanks) ws

5-18-76 Filed USM's Ret re Summons: (4)

Served U.S. Attorney General 4-14-76, 2 cert copies mailed to U.S. Atty Gen 4-13-76

Served William Coleman, Secretary of Transportation 4-22-76 by copy w/Emma Lewis

Served Owen W. Silare, Commandant U.S. Coast Guard by copy w/J. Collom 4-22-76

Served Russell Train, Adm Environmental Protective Agency by copy w/Georgia Prapas 5-5-76

6-7-76 Filed plf's Brief to Sup Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

6-8-76 Filed plf's Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

DATE	PROCEEDINGS

6-8-76 Ent Order grntg dfts 15 days to respond to plf's Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct (Eubanks) zmc ws

6-9-76 Filed Dfts' Mtn to Dism or, Alt, to Consolidate W/ CIV-76-0456-D w/Memo of Law attach—ws

6-10-76 Ent Order directing plf to respond to dfts' Mtn to Dism or, Alt, to Consolidate w/ CIV-76-0456-D w/sup brief, w/i 10 days hereof (Eubanks) zmc ws

6-24-76 Filed Dfts' Response to Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

6-25-76 Filed Plf's Ans to Mtn to Dism or Alt to Consolidate W/CIV-76-0456-D—ws

7-1-76 Filed Plf's Reply to Dfts' Response to Plf's Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

8-18-76 Filed Mr. Chason's ltr to Ct re outstanding mtns—ws

8-20-76 Filed Mr. Chason's ltr to Ct re outstanding mtns & trans. copy of CCofA's opinion—ws

8-25-76 Filed Mr. Jones' ltr to Ct, i.e., response to Mr. Chasan's foregoing ltrs—ws

8-26-76 Filed Memo Opinion & Order; that Plf's mtn for reconsideration of this ct's order conditionally denying the mtn for a 3 judge ct is grntd & the mtn to convene a 3 judge ct is unconditionally denied; dft's mtn to dism is denied; the alt mtn to consolidate this case w/CIV-76-456 is grntd; answer in 76-456 to be filed w/i 20 days hereof (Eubanks) ws

10-4-76 PRETRIAL, November 1, 1976, 10:00 a.m. (Eubanks)

11-1-76 Filed pltf's Mtn for Judg on the Pldgs &/or for SJ—ws

11-1-76 Filed plf's Brief in Sup of Mtn—ws

DATE	PROCEEDINGS

11-1-76 Ent PT; govt to file brief w/i 20 days to answer mtn for SJ; to be on the Enid jury dkt; both sides agree we will have a trial de novo; Ward may reply 7 days after Govt responds to its mtn for SJ (Eubanks) zmc

11-22-76 Filed Dft US's Memo in Oppo to Mtn for Judg on the Pldgs &/or for SJ—ws

11-24-76 Filed Dft USA's Interrogs—w/s

12-7-76 Filed plf Ward's Reply Brief to Gov'ts Brief in Opposition to Ward's Mtn for Judgm on the Pleadings &/or S. J.—w/s

12-13-76 Filed Independent Petroleum Association of America's Mtn for Leave of Ct to file Brief Amicus Curiae—w/s

12-13-76 Filed Earl Salo's ltr to Mr. Hawks enclosing a copy of a Ct's decision dealing w/the "sheen test", requesting it be brought to the ct's attention—w/s

12-22-76 Filed Memo Opinion & Order—that dfts' mtn for judgm on the pleadings or for s. j. is denied (Eubanks) w/s-zmc

1-21-77 Filed Plf's Answers to Interrogs propounded by the United States—ws

4-1-77 JURY DOCKET: MONDAY, MAY 9, 1977—9:30 A.M.—EUBANKS

5-3-77 Filed 3 praes for & iss'd subps on behalf of plf for: Ernie Thomas, Jay Nay, Ray Pickle, Gary Sober, Curley Corwin, Bill Fisher & Rod Ylitalo

5-4-77 Filed prae for & iss'l 1 subp in blank on behalf of the dfts

5-9-77 Filed Pretrial Order (Eubanks) ws

5-9-77 Filed Govt's PT Memo

5-9-77 Ent Jury Trial (Eubanks) zmc

DATE	PROCEEDINGS

5-10-77 Filed L.O. Ward's Req for Instr w/Judge's Rlgs thereon (Eubanks) ws

5-10-77 Filed Instructions to the Jury (Eubanks)

5-10-77 Filed Note from Jury w/Judge's Answer thereon (Eubanks)

5-10-77 Filed Jury's Interrog finding as follows: that oil did flow in a visible quantity from the "draw" on the L.O. Ward lease into Boggy Creek /s/ Gary W. Chapman, Foreman

5-10-77 Ent Further Jury Trial; plf to prepare order; ct. reduces the amt of penalty to $250.00; cnsl for dft to prepare order in 76-303 (Eubanks) zmc

5-13-77 Filed USM's Ret re subps (8)

5-18-77 Filed Stephen Jones' ltr to ct req'g a hrg date—ws

5-20-77 NONJURY: 6-13-77, 9:30 am (Eubanks)

6-7-77 Ent Order striking NJ of 6-23-77, to be reset on the next Civ NJ Dkt (Eubanks) zmc ws

8-2-77 NONJURY: 9-6-77, 9:30 am (Eubanks)

8-19-77 Filed plf's Response to the Gov't Mtn to Strike w/Memo to Sup Response—ws

8-22-77 Ent Order that the Mtn to Strike by USA is o/r & denied; the cases will remain on the dkt for the purpose of getting judgs settled in these cases (Eubanks) zmc ws

8-24-77 Filed Ct's ltr transmitting a portion of the Ct Reporter's transcript of what transpired at Enid last spring, to all cnsl of Record (Eubanks) ws

8-30-77 Filed Stephen Jones' ltr to Ct dated 8-26-77—ws

8-30-77 Filed Stephen Jones' ltr to Ct dated 8-26-77, stated as 2nd ltr—ws

DATE	PROCEEDINGS

8-30-77 Ent Order that such evid as the ptys desire to introduce re the constitutionality of 40 CFR 110.3(b), as enumerated in parag. 5C of the PTA Order herein, will be heard on 9-6-77, 9:30 am (Eubanks) zmc ws

9-6-77 Ent Evid Hrg; ptys appear by cnsl, make opening stmts; plf Ward presents evid w/test of witnesses, exhs admitted, plf rests; closing args; ct finds in favor of govt who is to prepare JE in ea case today (Eubanks) zmc

9-6-77 Filed plf's Brief in Sup of the Invalidity of 40 CFR § 110.3(b) ws

9-6-77 Filed AND ENTERED Final Judgment—THAT dfts L.O. Ward and L.O. Ward Oil and Gas Operations are jointly & severally liable to the US for a civil penalty of $250. (Eubanks) (CCB #122) (Clerk) (Copies to parties—zmc)

10-19-77 Filed Notice of Appeal of L. O. Ward, plf, from final jdgmt entered Sept. 6, 1977 (record due in CCofA 11-28-77)

10-19-77 Filed Clk's ltr re service of notice of appeal, w/copy ltr & notice of appeal to counsel & CCofA and copy d.s. to CCofA

10-19-77 Filed plf's Designation of Record—w/s

CIV-76-0456-E

UNITED STATES OF AMERICA, PLAINTIFF

WARD, L. O. and L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS

Consolidated W/76-303 8-26-76

CAUSE

33 USC 1321(n) and 28 USC 1345—Action to recover unpaid civil penalty assessed against defts.

FOR PLAINTIFFS

David L. Russell, USA & AUSA, 4434 U.S. Cthse, OC, 231-5281

and

Bruce J. Chasan, Atty, Dept of Justice, Wash, DC 20530 (202) 739-2793

Earl Salo, Atty, Dept of Justice, Wash, DC 20530 (202) 739-2738

Independent Petroleum Assoc. of America (Amicus Curiae) Harold B. Scoggins, Jr., Atty

FOR DEFENDANTS

Stephen Jones, P.O. Box 3339, Enid, OK 73701

DATE	PROCEEDINGS

6-4-76 Filed Complaint

6-4-76 Filed prae for & iss'd summons

6-21-76 Filed USM's Ret re Summons: (2)

Served L. O. Ward 6-16-76

Served L.O. Ward Oil and Gas Operations by serving L.O. Ward 6-16-76

6-23-76 Filed dfts' Mtn for Enlargement of Time to Answer Compl—ws

DATE	PROCEEDINGS

7-1-76 Filed dft Ward's Mtn to Enlarge Time in Which to Answer—ws

7-6-76 Ent Order grntg dft L.O. Ward ext of time of 45 days from 7-1-76 to answer to otherwise plead (Daugherty) ve ws

8-23-76 Ent Order transferring case to Judge Enbanks (Daugherty) ve ws

8-26-76 Filed copy of Memo Opinion & Order filed in 76-303 in which Ct directs that answer be filed w/i 20 days hereof & this case is consolidated w/76-303 (Eubanks) ws

9-16-76 Filed Mr. Jones ltr to Ct requesting leave of ct to file answer one week late—w/s

9-16-76 Ent Order—for good cause shown, the defts Ware are granted 7 days from & after 9-15-76, w/in which to file their answer herein (Eubanks) zmc

10-4-76 PRETRIAL, November 1, 1976, 10:00 a.m. (Eubanks)

9-24-76 Filed dfts' Answer—ws

11-1-76 Filed dfts' Mtn for Judg on the Pldgs &/or for SJ—ws

11-1-76 Filed dfts' Brief in Sup of Mtn—ws

11-1-76 Ent PT; govt to file brief w/i 20 days to answer mtn for SJ; to be on the Enid jury dkt; both sides agree we will have a trial de novo; Ward may reply 7 days after Govt responds to its mtn for SJ (Eubanks) zmc

11-22-76 Filed plft's Mmoe in Oppo to Mtn for Judg on the Pldgs &/or for SJ—ws

11-24-76 Filed plf's Interrogs—w/s

12-7-76 Filed Plf Ward's Reply Brief to Government's Brief in Opposition to Ward's Mtn for Judgm on the Pleadings &/or S. J.

DATE	PROCEEDINGS

12-13-76 Filed Independent Petro. Assoc of Amer.'s mtn for lve of ct. to file brief amicus curiae

12-13-76 Filed Earl Salo's ltr to Mr. Hawks enclosing a copy of a Ct's decision dealing with the "sheen test", requesting that it be brought to the cts' attention. ws

12-22-76 Filed Memo Opinion & Order—that dfts' mtn for judgm on the pleadings or for s.j. is denied (Eubanks) w/s—zmc

1-21-77 Filed dfts' answers to interrogs w/s

4-1-77 JURY DOCKET: MONDAY, MAY 9, 1977—9:30 A.M.—EUBANKS

5-3-77 Filed 3 praes for & iss'd subps on behalf of L. O. Ward, for: Ernie Thomas, Jim Nay, Ray Pickle, Gary Sober, Curley Corwin, Bill Fisher, Rod Ylitalo

5-4-77 Filed prae for & iss'd 1 subp in blank on behalf of the plf

5-9-77 Filed Pretrial Order (Eubanks) ws

5-9-77 Filed Govt's PT Memo

5-9-77 Ent Jury Trial (Eubanks) zmc

5-10-77 Filed L.O. Ward's Req for Instr w/Judge's Rlgs thereon (Eubanks) ws

5-10-77 Filed Instructions to the Jury (Eubanks)

5-10-77 Filed Note from Jury w/Judge's Answer thereon (Eubanks)

5-10-77 Filed Jury's Interrog findings that oil did flow in a visible quantity from the "draw" on the L.O. Ward lease into Boggy Creek /s/Gary W. Chapman, Foreman

5-10-77 Ent Further Jury Trial; plt to prepare order; ct reduces the amt of penalty to $250.00 cnsl for dft to prepare order in 76-303 (Eubanks) zmc

5-13-77 Filed USM's Ret re Subps (8)

5-18-77 Filed Stephen Jones' ltr to Ct req'g a hrg date—ws

DATE	PROCEEDINGS

5-20-77 NONJURY: 6-13-77, 9:30 am (Eubanks)

6-7-77 Ent Order striking NJ of 6-13-77, to be reset on the next Civ NJ Dkt (Eubanks) zmc ws

8-2-77 NONJURY: 9-6-77, 9:30 am (Eubanks)

8-16-77 Filed USA's Mtn to Strike w/Brief in Sup—ws

8-22-77 Ent Order that the Mtn to Strike by USA is o/r & denied; the cases will remain on the dkt for the purpose of getting judgs settled in these cases (Eubanks) zmc ws

8-24-77 Filed Ct's ltr transmitting copy of Ct Reporter's portion of transcript of what transpired at Enid last spring (Eubanks) ws

8-30-77 Ent Order that such evid as the ptys desire to introduce re the constitutionality of 40 CFR 110.3(b), as enumerated in parag. 5C of the PT Order herein, will be heard on 9-6-77, 9:30 am (Eubanks) zmc ws

9-6-77 Ent Evid Hrg; ptys appear by cnsl, make opening stmts; plf Ward presents evid w/ test of witnesses, exhs admitted, plf rests; closing args; ct finds in favor of govt who is to prepare JE in ea case today (Eubanks) zmc

9-6-77 Filed dfts' Brief in Sup of the Invalidity of 40 CFR § 110.3(b) ws

9-6-77 Filed AND ENTERED Final Judgment—THAT dfts L. O. Ward and L.O. Ward Oil and Gas Operations are jointly & severally liable to the US for a civil penalty of $250. (Eubanks) (COB #122) (Clerk) (Copies to parties—zmc)

10-19-77 Filed Notice of Appeal of dfts from final jdgmt entered Sept 6, 1977 (record due in CCofA 11-28-77)

10-19-77 Filed Clk's ltr re service of notice of appeal, w/copy ltr & notice of appeal to counsel & CCofA and copy d.s. to CCofA

10-19-77 Filed dfts' Designation of Record—w/s

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Civil Case No. 77-1952

Appeal from the United States District Court
For the Western District of Oklahoma

598 F.2d 1187 (1979)

L. O. WARD, PLAINTIFF-APPELLANT

vs.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, RUSSELL E. TRAIN, individually and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS-APPELLEES

and

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

L. O. WARD and L. O. WARD OIL and GAS OPERATIONS, DEFENDANTS-APPELLANTS

OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, AMICUS CURIAE

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AMICUS CURIAE

ENERGY CONSUMERS AND PRODUCERS ASSOCIATION, INC., AMICUS CURIAE

MOUNTAIN STATES LEGAL FOUNDATION, INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES, and ROCKY MOUNTAIN OIL and GAS ASSOCIATION

ATTORNEYS FOR APPELLANT

(a) Stephen Jones (Ward)
Jones & Gungoll
P.O. Box 3339
Enid, Oklahoma 73701
(405) 233-4321

For Independent Petroleum Association of America

(a) Harold B. Scoggins, Jr.
1101 16th Street, N.W.
Washington, D.C. 20036
(202) 466-8240

ATTORNEYS FOR APPELLEE

For Okla. Independent Petroleum Assn. as Amicus Curiae

(a) Terry R. Doverspike
W. Bland Williamson
Pray, Scott, Williamson & Marlar
2910 Fourth National Bldg.
Tulsa, Oklahoma 74119
(918) 583-1366

For Energy Consumers & Producers Assn. Amicus

(a) Fred Gipson
P.O. Box 1641
Seminole, Oklahoma 74368
(405) 382-5555

For Mountain States Legal Foundation, et al:

Kea Bardeen

(a) James G. Watt
1845 Sherman Street
Denver, Colorado 80028
(303) 861-0244

DATE	PROCEEDINGS

11/22/77 Cause docketed; docketing statement, orig. & 9 cc.

11/30/77 Copy of Dist. Ct. order extending time to file record to 12/28/77.

12/3/77 Appearance—Appellant (Ward)—Jones

12/23/77 Record on apeal, Vol. I, II (pleadings) (686 pp.), Vols. III, IV (exhibit) (17 pp.), Vols. V, VI (transcript) (208 pp.), orig. (911 pp.)

12/19/77 Appearance—Appellee, Moorman, Strass, McCord

12/29/77 Order—Assigned to Calendar B—Appellant's brief due 1/19/78—Seth

1/16/78 Appellant's (Ward) motion for ext to 2/16/78 to file brief—Orig. only, Order: Appellant GRANTED to 2/16/78 to file brief—HKP—consl ntfd.

4/4/78 Mot of Okla. Independent Petroleum Assn. for leave to file brief amicus curiae w/consent, O & 13 cc, c/s (replaced by mot filed 4/5/78)

Brief of Okla. Independent Petroleum Assn. as Amicus Curiae, O & 13 cc, c/s (RECEIVED) (replaced by brief attached to mot filed 4/5/78)

4/5/78 Mot of Okla. Independent Petroleum Assn. for leave to file brief amicus curiae w/consent, w/brief attached, O & 13 cc, c/s, replacing mot filed 4/4/78 w/brief attached (to panel) BRIEF FILED 4/17/78

Appearance—Amicus Curiae—W. Bland Williamson, Terry R. Doverspike

4/14/78 Appellee (U.S.A.) mot for ext to 5/1/78 to file brief, O & 3 cc, c/s

Order—appellee (U.S.A.) GRANTED to 5/1/78 to file brief—HKP—cnsl notf

DATE	PROCEEDINGS

4/17/78 Order—motion for leave to file a brief amicus curiae by Oklahoma Independent Petroleum Association is granted; brief ordered filed as of 4/17/78—Lewis, McWilliams

Amicus' brief O & 25 cc, c/s (Energy Consumers & Producers Assn)

5/1/78 Appellee's (U.S.A.) mot for ext to 5/11/78 to file brief, O & 3 cc, c/s

Mot of Independent Petroleum Assn. for leave to file brief amicus curiae & for ext to 5/1/78 to file brief, O & 4 cc, c/s (to panel 5/3/78)

Brief of Independent Petroleum Assn. as amicus curiae, O & 4 cc

5/2/78 Order—appellee (U.S.A.) GRANTED to 5/11/78 to file brief—HKP—cnsl note

5/8/78 Order: Upon consideration, Independent Petroleum Association of America is GRANTED leave to file a brief amicus curiae. Brief is ordered filed as of May 1, 1978.

Appellees' consent to filing brief amicus curiae by Energy Consumers & Producers Assn, O only

5/15/78 Appellee's (U.S.A.) mot for ext to 5/22/78 to file brief, O & 3 cc, c/s

Order—appellee GRANTED to 5/22/78 to file brief. No further extension will be granted—RLH—cnsl notf'd

5/17/78 Appearance—Amicus Energy Consumers—Fred Gipson

5/30/78 Appellee's (USA) brief, O & 9 cc, c/s

6/2/78 Appellant's mot for ext to 6/30/78 to file reply brief, O & 3 cc

Order—appellant GRANTED to 6/30/78 to file reply brief—RLH—cnsl

6/8/78 Appellee's correction to brief, orig. & 9 cc.

DATE	PROCEEDINGS

6/12/78 Appearance—Independent Petroleum Association—Scoggins

6/23/78 Motion for leave to appear and file brief of amici curiae and leave to participate in oral argument, orig. & 9 cc, c/s (to

Amici Curiae brief, orig. & 9 cc., c/s (to panel 6/27/78)

6/28/78 Appellant's mot for ext to 7/15/78 to file reply brief, O & 4 cc

Order—appellant granted to 7/15/78 to file reply brief —RLH—cnsl

7/6/78 Order—Mountain States Legal Foundation, Independent Petroleum Association of the Mount States, Rocky Mountain Oil and Gas Association granted leave to file amici curiae brief; brief to be filed at 6/23/78; motion for leave to participate in oral argument denied without prejudice to right to renew motion when case is set for oral argument.—Lewis, McWilliams

7/19/78 Appellant's letter mot to file reply brief out of time, O only

Appellant's reply brief, O & 14 cc, c/s

Order—appellant granted leave to file reply brief out of time

2/16/79 HRG. SET Hearing set for March, 1979, Term—Denver, Colorado

2/27/79 M.PTP.ARG.F Amici's motion participate in oral argument file copies, c/s.

M.ADD.TM.ARG.F Amici's motion for additional time for oral argument filed, 4 copies, c/s.

2/28/79 M.PTP.ARG.SUB Amici's motion to participate in oral argument submitted

M.ADD.TM.ARG.SUBM Amici's motion for additional time for argument submitted (to panel).

DATE	PROCEEDINGS

3/5/79 M.ADD.TM.ARG.DISP. Granted Amici's motion for additional time for argument disposed of by Holloway

3/8/79 ADD.AUTH.F Appellee's additional authorities filed, 10 copies,

ADD.AUTH.SUBM Appellee's additional authorities submitted (to panel).

3/14/79 CS.ARG.SUBM—case argued and submitted—Holloway, Barrett, McKay

5/10/79 OPN.F—published signed opinion filed by Holloway, Barrett, McKay. Writing judge is Barrett.

JM.DISP—Judgment reversed and remanded by published signed opinion of Holloway, Barrett, McKay

5/24/79 SCOST. ISS. Issued statement of costs in favor of appellants against appellees in the amount of $65.00

6/1/79 MDT.ISS—Mandate issued to District Court

6-4-79 ROA.RMK. Letter re record sent to Judge Barrett

6-8-79 MDT.RCPT.F. Mandate receipt filed.

7/3/79 ROA.RTN.DC. Record on appeal returned to District Court (Vol. I-VI)

7-10-79 ROA.RCPT.F. Record on appeal receipt filed

9/13/79 P.WRIT.CERT.F—appellee's petition for writ of certiorari filed 9/7/79—Supreme Court No. 79-394

11/8/79 P.WRIT.CERT.DISP—petition for writ of certiorari granted order of Supreme Court 11/5/79

A-18

Copy to Enforcement: yes ✓ no ___

SPILL REPORT FORM

Oil and Hazardous Substances

R.L

Date: 4/2/75 Time: P.M.

Received by: D. Curtis

Case No.: E75-352

1. Person Reporting: Lou Ward

   Address: Ponca City Tel. No.: 237-55

2. Spiller: Lou Ward

   Address: P.O. Box 1187, Enid, Okla. 73701 Tel. No.: 405/234-3

3. Spill Location SE Sec 17 22N 6W, Garfield Co.
   Okla., Hwy 81 & Cutz, S.E. of Enid.

4. Spill Occurred: Date Late 3/28/75 Time ___

5. Spill Stopped: Date ~ 3/29/75 Time ___ On-Going ___

6. Water Body Affected: Tributary of Bugg Creek —
   250 yds and possibly Bugg Creek

7. Material Spilled: Crude Amount: est ~200 bbls

8. Source of Spill: #2 Blansit Lease - Well

9. Cause of Spill: pit overflow

10. Type Operation: Production - new well

11. Spill Contained: Yes ✓ No ___ Method: hay dam

12. Cleanup Started: Yes ✓ No ___ Finished: Yes ___ No ✓
    Date ~ 3/28/75 Date should by 4/3/75
    Method hay-scraper

13. Environmental Damage: None ___ Describe: unknown

14. State Notified: Yes ✓ No ___ Agency OCC & Health Dept.

15. SPCC Plan Prepared ? (new facility) and Implemented ___

16. Comments: Case closed.

17

Dec..

4/3/95 0930hrs - I called
Rod Vitale - Engineer for Lowland
Spill was cleaned up by 4/4/95. Some
preventive measures still in effect - to
keep more oil from getting into creek.

First well on lease was completed
in 1971.

They are currently trying to comply
with the SPCC Regs.

CERTIFIED MAIL: RETURN RECEIPT REQUESTED
(819436)

Lou Ward
Box 1187
Enid, Oklahoma 73701

Gentlemen:

The Environmental Protection Agency has received a report that your company was involved in the discharge of a harmful quantity of oil, estimated to be 840 gallons into waters of the United States, to wit: An unnamed tributary of Boggy Creek near Enid, Garfield County, Oklahoma on or about March 23, 1975 from a facility which you own (or operate).

The 1972 Amendments to the Federal Water Pollution Control Act (hereinafter, the "Act") prohibits the discharge of oil or a hazardous substance into or upon the waters of the United States in harmful quantities [33 U.S.C. 1321(b)(3)]. Any owner or operator of a vessel or facility from which oil or a hazardous substance is discharged shall be assessed a civil penalty by the Coast Guard of not more than $5,000 [33 U.S.C. 1321(b)(6)]. The definition of harmful quantities of oil appears in Title 40, Code of Federal Regulations, Section 110.3.

In order for this Agency to carry out its responsibilities under the Act, you are required under authority of Section 308 of the Act (33 U.S.C. Section 1318) to submit a letter of explanation including the specific information listed in Attachment A.

The letter of explanation must be submitted to: Mr. Ralph Corley, 1600 Patterson, Suite 1100, Dallas, Texas 75201, within fourteen (14) days of receipt of this letter. It must be signed by a duly authorized official of the corporation or company. The information submitted will be considered in evaluating whether the oil spill violated Section 311. [Please note that your reply in no way constitutes immediate notification of a spill to the appropriate Federal agency, as required by Section 311 (b)(5).] Section 309 of the Act (33 U.S.C. Section

1319) provides civil and criminal penalties for failure to submit information required under Section 308 and criminal penalties for knowingly making a false statement in any submission under Section 308.

6AEEL:RCorley:x2142:WPC:sh:AEEL-11:x3855:
5/13/75

6AEEL Benthul

[Illegible] 5/29/75

If you have any questions, please contact Ralph Corley, Attorney, Legal Branch, Enforcement Division, at (214) 749-2142.

Sincerely yours,

Original Signed by
James J. Doyle
Director
Enforcement Division

Attachment

ATTACHMENT A

The following information is submitted concerning F7S-652

1. Time and date of discharge: Time unknown, March 23, 1975.
2. Location of discharge, including:
   A. Name of Municipality and State: Enid, Oklahoma.
   B. Name and address of industry or commercial establishment at which the discharge occurred: L. O. Ward, Operator, Blansit #2 Well SL/4 Section 17-22N-6W, Garfield County, Oklahoma.
   C. Distance from receiving waterway: Estimated 100 yards.
   D. Name of receiving waterway, or first named waterway into which it flows: Boggie Creek.
3. Type of material discharged: Oil.
4. Quantity discharged: 20 bbl. or 840 gallons.
5. Quantity of material which eventually reached the receiving waterway, and date and time it was discovered: Estimated 5-15 bbl. (Approximately 10-15 bbl. recovered.) Discovered PM March 24, 1975.
6. Type of vessel or facility (Ship, Barge, Storage Tank, Tank Truck, etc.) in which the oil was originally contained: Open earth working pit. (Pits used during drilling operations.)
7. Describe in detail what actually caused the discharge: Oil had been produced during a short isolated test from a second zone in the well. The test volume of oil remained in the working pit for 90 days after the completion crew had been released. Unusually high rainfalls, accompanying extremely turbulent weather filled the pits and caused overflow which floated down

to the run off tributary. Company personnel were unaware, at the time, of pit filling due to the unaccessable location during the inclement weather.

8. Name and address of owner of facility causing the discharge:

   L. O. Ward, Operator et al
   Box 1187, Enid, Oklahoma 73701

9. Name and address of operator of facility causing the discharge: Same as above.

10. Describe damage to the environment: Environment affected was Native Grass. No damage to the vegetation or other environment. Vegetation is growing as normal.

11. Described steps the above named owner or operator took to clean up the spilled oil and dates and time steps were taken: March 24. Upon discovery of the spill, teams of men were immediately dispatched to the spill area. Outside help was employed along with company personnel. They employed barriers made of wood and straw, plus tank trucks to pick up any available free oil. The oil soaked straw and alfalfa were transported from the area for separate containment. This activity lasted for three days. For several days straw and alfalfa dams were replaced daily to insure all oil being retrieved. Then a power wash unit was employed to wash residue which adhered to the grass and bruch. This fluid was also picked up. It was later advised we burn any residue debris. The clean operation was successful in full restoration of the area.

12. Action by company to mitigate damage to the environment: See 11. above.

13. Measures taken by your company to prevent future spills: The pits were filled with a dozer. Straw and absorbents are stored for emergency use. Dikes are being used in facility to restrain migration.

14. Was water flowing into receiving waterway during spill or clean-up?: Yes, Boggie Creek is a continuous flowing body of water.

15. List the Federal and State Agencies to which the owner or operator named in 8. and 9. above reported this discharge:

Agency	Location	Official
EPA, Federal Agency	Dallas, Texas	David Curtis
Oklahoma Corp. Comm. State of Oklahoma	Kingfisher, Oklahoma	Lloyd Barrier
City of Enid, Oklahoma	Enid, Oklahoma	Monty Montgomery
County Health Dept. Garfield County, Oklahoma	(see attached letter)	

16. List the names and addresses of persons you believe have knowledge of the facts surrounding this incident:

Curly Corwin 2135 Sundown Circle Enid, Oklahoma	Bill Fisher 1310 Gannon Enid, Oklahoma	Rod Ylitalo 138 Margaret Circle Enid, Oklahoma

Submitting this report does not constitute an acknowledgement of violation of any rules, regulations or laws of the Environmental Protection Agency. The undersigned believes the occurrence was unfortunate, but that the quantity involved did not constitute a hazardous material. The undersigned also believes that the incident was handled prudently and responsibly.

The above answers are true to the best of my knowledge and belief.

Date of Signature: [illegible]

Signature of person completing this report
/s/ [L. O. Ward]

Case No.: F7S-652

[SEAL]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION VI
1600 Patterson
Dallas, Texas 75201

[Received Aug. 15, 1975]

Commander J. D. Webb (MEP)
Second U.S. Coast Guard District
Federal Building
1520 Market Street
St. Louis, Missouri 63103

Re: Our File F75-652

Dear Commander Webb:

Transmitted herewith is evidence which documents violation of 33 USC 1321(b)(3) by L. O. Ward, Box 1187, Enid, Oklahoma 73701. We request that a civil penalty be assessed against L. O. Ward pursuant to 33 USC 1321 (b)(6).

The alleged violation resulted from an oil spill into Boggie Creek, Garfield County, Oklahoma, on or about March 23, 1975. Approximately 10 barrels of oil were discharged into Boggie Creek. All information transmitted herewith was submitted by discharger pursuant to 33 USC 1318.

We recommend that a civil penalty in the range of $500 to $1000 would be appropriate for this spill. Our recommendation is based upon an evaluation of the gravity of the violation, an assumption that a penalty with the suggested range will not have a significant effect upon L. O. Ward to continue in business, and upon our judgment that such a penalty is appropriate considering the size of the company.

Please keep this office advised of the progress of this case. If you need assistance or additional information,

please contact Mr. Ralph Corley at (214) 749-2142 in Dallas, Texas.

Sincerely yours,

/s/ Harless R. Benthul
HARLESS R. BENTHUL
Chief, Legal Branch
Enforcement Division

Enclosure(s)

[SEAL]

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Mailing Address:

U.S. Coast Guard (G-LMI/81)
Washington, D.C. 20590
Phone: 202-426-1527
5830/5-2

11 Feb. 1976

[Rec'd Feb. 16]

Jones & Gungoll
Attention: Stephen Jones, Esq.
P.O. Box 3339
Enid, Oklahoma 73701

Gentlemen:

The Commander, 2nd Coast Guard District, St. Louis, Missouri, has forwarded the file in Penalty Case No. 2P50770, including your appeal on behalf of Mr. L. O. Ward, owner of the oil drilling facility involved. The appeal is from the action of the District Commander in assessing a penalty of $500.00 against the company under the authority of section 1321(b)(6) of Title 33, U.S. Code (section 311(b)(6) of the Federal Water Pollution Control Act) for violation of section 1321(b)(3) which prohibits the discharge of oil in harmful quantities into or upon the waters of the United States. The assessment was based on the finding that a harmful quantity of oil, estimated at 840 gallons was discharged from the facility into Boggie Creek, Garfield County, Oklahoma, on 23 March 1975. The discharge occurred when a oil drilling facility overflowed during a heavy rainfall. Your appeal is denied for the reasons stated below.

First, you contend that the statute upon which the proceeding is based and the requirement to submit a written statement to report a discharge is unconstitutional.

You further argue that the penalty assessed is contrary to the weight of the evidence and that the penalty is excessive.

The constitutionality of various provisions of the Act is not, of course, a matter which can be decided by the Coast Guard.

It is the mandate of Congress as expressed in the Federal Water Pollution Control Act that there shall be no discharges of oil into or upon the waters of the United States. The Act provides that a penalty of not more than $5,000.00 shall be assessed against the owner or operator of any vessel or facility from which oil is discharged in harmful quantities. The statute requires that the following factors be considered in determining the amount of the penalty to be assessed: the appropriateness of the penalty to the size of the business of the owner or operator; the effect on the owner's or operator's ability to continue in business; and the gravity of the violation. It is not necessary to find intent or negligence, as the law prohibits *any* discharge of a harmful quantity of oil.

In all oil pollution incidents it is incumbent upon the person in charge to immediately notify the Coast Guard of such discharges. A failure to do so is a criminal act subjecting such persons (which includes an individual, firm, corporation, association or partnership), to a fine of not more than $10,000.00 or imprisonment for not more than one year, or both.

It is felt that there is sufficient evidence shown in the record to warrant the penalty assessed in this case. The entire record has been reviewed and the penalty assessment is considered fair and reasonable.

To carry out the intent of the law it is the policy of the Coast Guard to assess a penalty at or near the maximum unless a lesser penalty is clearly justified. I have reviewed the arguments raised in your appeal and find that proper consideration has been given to the applicable

provisions of law in evaluating the facts in this case. The assessed penalty of $500.00 is approved.

The penalty of $500.00 is due and must be paid within 30 days from the date of receipt of this letter. Payment should be made by check or money order payable to the U.S. Coast Guard and forwarded to the Commander, 2nd Coast Guard District (d1), Federal Building, 1520 Market Street, St. Louis, Missouri 63103. Failure to make payment within the period prescribed will result in the case being forwarded by the District Commander to the U.S. Attorney for appropriate action.

Sincerely,

/s/ R. A. Ratti
R. A. RATTI
RADM, U.S. Coast Guard
Chief Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKALHOMA

[Filed May 9, 1977]

No. CIV-76-0303-E

L. O. WARD, PLAINTIFF

vs.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation, et al., DEFENDANTS

No. CIV-76-0456-E

UNITED STATES OF AMERICA, PLAINTIFF

vs.

L. O. WARD and L. O. WARD
OIL and GAS OPERATIONS, DEFENDANTS

PRE TRIAL ORDER

As a result of the pre trial conference held herein, where Plaintiff was represented by Stephen Jones and the Defendant United States of America by Richard Campbell, their attorneys of record, the following issues of fact and law were framed, stipulations made, and other matters considered and ordered as follows:

1. The contentions of the United States of America are as follows:

A. On or about March 23, 1975, an estimated twenty barrels (840 gallons) of oil and drilling mud overflowed from an open earth pit at a drilling site owned and operated by L. O. Ward near Boggy Creek, Garfield County, Oklahoma. That a harmful quantity of oil and drilling mud, approximately ten barrels, flowed from the

discharge site into Boggy Creek, Garfield County, Oklahoma.

B. Boggy Creek is a navigable water of the United States within the meaning of 33 U.S.C. § 1362(7).

C. That the aforesaid discharge was a violation of 33 U.S.C. § 1321(b)(3).

D. That the United States Coast Guard through Commander J. D. Webb assessed an appropriate and reasonable fine against L. O. Ward in the nature of a penalty and that said Commander Webb reviewed all of the material in his file in order to consider the size of Defendant's business, the affect of the penalty on Defendant's ability to continue in business and the gravity of the violation.

E. L. O. Ward has not paid the $500.00 civil penalty imposed by Commander J. D. Webb after due demand has been made.

2. L. O. Ward's contentions are as follows:

A. That the provisions of 33 U.S.C. § 1318(a)(4)(A)(ii), 33 U.S.C. § 1319(c)(1), 33 U.S.C. § 1321(b)(5)(6) and 40 C.F.R. § 110.1(L) and 110.4(b) are unconstitutional as being violative of the Fifth Amendment of the United States Constitution.

B. Boggy Creek is not a navigable stream within the meaning of the Act.

C. Acting pursuant to the above mentioned statutes, L. O. Ward submitted to the Environmental Protection Agency, and its agents, a written report of the alleged oil spill. Said report being prepared and filed pursuant to the provisions of 33 U.S.C. § 1318(a)(4)(A)(ii).

D. The only material furnished to the Coast Guard and the only basis upon which the penalty was determined against Mr. Ward was the material that Ward had previously submitted to the United States Environmental Protection Agency as outlined above.

E. That the statutes and procedures relied upon by the United States of America and the Defendants in case number CIV-76-0303 are violative of the Fifth Amendment to the Constitution of the United States.

F. That the spill was caused by an act of God or other acts beyond the control of L. O. Ward and that no

penalty should be assessed against him on the grounds that Ward is without fault in the premises.

G. That upon notice of the spill Ward undertook all proper steps to remove oil from water, prevent it from going to a navigable stream and otherwise safeguard the surrounding environment.

3. Admitted facts:

A. The identification of the parties, the venue, jurisdiction, residence, and citizenship is admitted except that William Coleman is no longer Secretary of Transportation but that the position has been filled by the Honorable Brock Adams.

B. L. O. Ward is engaged in a business operation as an independent oil and gas producer with his place of business at 1420 Lahoma Road, Enid, Oklahoma.

C. On or about March 23, 1975, a drilling facility owned and operated by L. O. Ward sustained a discharge of oil.

D. Thereafter, notification was made of the spill to the United States Environmental Protection Agency by L. O. Ward or his agents. On or about June 24, 1975, Ward submitted to the Environmental Protection Agency and its agents a written report of the alleged oil spill. Said report was prepared as required by law.

E. Thereafter, on August 15, 1975, agents of the Defendant Train, acting pursuant to law, notified J. D. Webb, Commander, Second United States Coast Guard District, in St. Louis Missouri, of the alleged violation by Ward of 33 U.S.C. § 1321(b)(c). The United States Environmental Protection Agency, headed by the Defendant Train, and acting pursuant to his directions, requested of the Coast Guard that a civil penalty be assessed against the Plaintiff L. O. Ward pursuant to 33 U.S.C. § 1321(b)(6).

F. On December 19, 1975, Commander J. D. Webb acting on behalf on the Commandant of the Coast Guard assessed a penalty of $500.00 against L. O. Ward because of a finding of a violation of 33 U.S.C. § 1321(b)(3).

G. Thereafter, L. O. Ward notified J. D. Webb of his desire to appeal and the appeal was subsequently denied.

H. At all material times herein, L. O. Ward has asserted as a defense that the statute upon which the proceedings were based is unconstitutional, that the requirement that he submit a written statement to report any violations was unconstitutional and that the penalty of $500.00 was contrary to the rate of the evidence and the imposition was unconstitutional.

I. L. O. Ward exhausted all administrative remedies prior to the filing of this suit.

4. Was the spill which occurred on March 23, 1975, the result of negligence by L. O. Ward or his agents and servants or was it caused by events beyond his control and/or an act of God.

B. Did a harmful quantity of the discharge reach Boggy Creek, Oklahoma.

C. The amount of the fine to be imposed, if any.

5. Contested issues of fact and law to be determined by the Court:

A. Boggy Creek is a tributary of Skeleton Creek which is a tributary of the Cimarron River which is a tributary of the Arkansas River.

B. Are the statutes and procedures set forth above and relied upon by the United States of America and the Defendants in CIV-76-0303 violative of the Constitution of the United States of America.

C. Are the provisions of 40 C.F.R. 110.3(b) which provides in part that a discharge of oil which causes a "film or sheen or discoloration of the surface of the water" constitutes a harmful quantity, arbitrary, unfair, capricious, and contrary to the intent of the Congress, and therefore, an unreasonable exercise of the delegated power and inconsistent with 33 U.S.C. § 1321(b)(6) and in violation of the Constitution of the United States of America.

6. The parties are directed to exchange witness lists by May 2, 1977, and the same is to be part of the pre trial order as though fully copies at length herein. The parties are to furnish the Court requested instructions and trial briefs by May 5, 1977. All discovery is to be completed by May 5, 1977. This matter is ordered for

trial on the civil jury docket beginning May 9, 1977, at 9:30 A.M. in the United States Courthouse at Enid, Oklahoma, 115 West Broadway.

7. All exhibits to be introduced are to be marked in advance and to be available for inspection by opposing counsel at least six days before the trial date: to wit, May 3, 1977. The exhibits of all parties thus marked and produced for inspection may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Should either party object to stipulating to authenticity and identification of the exhibit, it will notify the other party at least five days before trial in writing: to wit, May 4, 1977.

The foregoing pre trial order has been approved by both parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings passed out of the case and the issues as joined herein be the issue to be tried, and this pre trial order shall not be amended, except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated in Oklahoma City, this 6 day of May 1977.

/s/ [Illegible]
United States District Judge

Approved as to form:

/s/ Stephen Jones
STEPHEN JONES
Attorney for Plaintiff

/s/ Richard Campbell
RICHARD CAMPBELL
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil No. 76-0456-E

Consolidated

[Filed Sep. 6, 1977]

L. O. WARD, PLAINTIFF

—*vs.*—

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, RUSSELL E. TRAIN, individually and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS

Civil No. 76-0303-E

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

L. O. WARD & L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS

FINAL JUDGMENT

The United States seeks to collect a $500 penalty which has been administratively assessed against L. O. Ward by the United States Coast Guard pursuant to 33 U.S.C.

§ 1321(b)(6) for an alleged discharge of oil into navigable waters. The Court has already found that the penalty imposed was civil in nature, that the self-reporting provision of 33 U.S.C. § 1321(b)(5) does not violate the Fifth Amendment's protection against self-incrimination, that the imposition of a penalty after notice and hearing withstands constitutional attack, and that the definition of "harmful quantities" of oil at 40 C.F.R. § 110.3 is a valid regulation under 33 U.S.C. § 1321(b)(4). *Ward* v. *Coleman*, 423 F.Supp. 1352. The case was tried to a jury on May 10, 1977.

The parties had stipulated that a facility owned and operated by Ward sustained a discharge of oil on or about March 23, 1975. At trial, the following additional facts were established by undisputed testimony. The discharge resulted when the entire contents of a shale pit connected to Ward's drilling operations drained out. Some of the oil reached a small draw near the shale pit. Some of the oil flowed down the draw, and some was deposited on the banks of the draw, and on vegetation in the draw. The draw flows in a northerly direction, and enters Boggy Creek at a point approximately 2000 feet north of the point where the oil entered the draw. Some of the oil flowed at least as far as a point about 100 feet from the confluence of the draw with Boggy Creek. Although defendants' witnesses denied that any oil reached Boggy Creek, the Court concluded that the jury could reasonably find that oil in a harmful quantity[1] did reach Boggy Creek. The Court submitted an interrogatory to the jury. In response, the jury found that oil did flow in a visible quantity from the draw into Boggy Creek.

The parties had stipulated that Boggy Creek is a tributary of Skeleton Creek, which is a tributary of the Cimarron River, which is a tributary of the Arkansas River. The Court takes judicial notice that the Arkansas River is navigable in fact. The Court concludes that

[1] "Harmful quantity" has been administratively defined to include discharges which ". . . cause a film or sheen or discoloration of the surface of the water. . .", 40 C.F.R. § 110.3(b).

boggy creek is a navigable water of the United States for the purposes of the Federal Water Pollution Control Act, pursuant to 33 U.S.C. 1362(7). *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 (C.A. 6, 1974); *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz., 1975).

The Court concludes that Ward is liable for a civil penalty under 33 U.S.C. § 1321(b)(6), inasmuch as he is the owner and operator of an onshore facility from which oil was discharged in harmful quantities into the navigable waters of the United States.

The penalty to be imposed is a question for the Court. *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 438 (C.A. 2, 1974); *United States* v. *ITT Continental Baking Co.*, 485 F.2d 16, 21 (C.A. 10, 1973). The Court received evidence on two matters that it found relevant to the reasonableness of the penalty assessed by the Coast Guard. First, there was evidence concerning the cause of the discharge. This evidence was inconclusive. Second, there was undisputed testimony that Ward had his employees and independent contractors conduct clean-up operations beginning on March 25, 1975.[2] The Court finds that the cause of the spill is unknown, and that Ward's clean-up operations were good, and that $500 is therefore an excessive penalty. The Court therefore reduces the penalty to $250.

The Court granted Ward's request for a second hearing, over the objections of the United States. At that hearing, the Court received evidence on the harmful effects of oil on domestic animals, wildlife, aquatic life and vegetation. Two expert witnesses called by Ward denied that the mere presence of a sheen could establish that an oil discharge was toxic. One of these witnesses also stated, however, that a quantity of oil that produced a rainbow sheen might have a harmful effect on aquatic life. The evidence also showed that the presence of a sheen demonstrated that a finite amount of oil had been

[2] The Government objected that evidence of Ward's clean-up operations was irrelevant to the size of the penalty, citing *United States* v. *W. B. Enterprises*, 378 F.Supp. 420, 422 (S.D.N.Y., 1974).

discharged, and that the minimum amount spilled could be determined from the size and appearance of the sheen. Finally, the evidence showed that it would be administratively unworkable to require that every discharge of oil be scientifically analyzed before it could be deemed "harmful" for the purposes of 33 U.S.C. § 1321. The Court therefore reaffirms its conclusion that the definition of harmful quantities at 40 C.F.R. § 110.3, and in particular, the "sheen test" at 40 C.F.R. § 110.3(b), are lawful and constitutional. *United States* v. *Boyd*, 491 F.2d 1163 (C.A. 9, 1973); *United States* v. *Chevron Oil Co.*, 9 ERC 1503 (E.D. La., 1976).

IT IS THEREFORE ORDERED AND ADJUDGED that defendants L. O. Ward and L. O. Ward Oil and Gas Operations are jointly and severally liable to the United States for a civil penalty of $250.

/s/ Luther B. Eubanks
United States District Judge

APPROVED AS TO FORM:

/s/ Earl Salo
EARL SALO
Attorney, Department of Justice
Washington, D.C. 20530

/s/ Stephen Jones
STEPHEN JONES
Attorney for L. O. Ward
P.O. Box 3339
Enid, Oklahoma

UNITED STATES COAST GUARD
23 FEB 1973

COMMANDANT INSTRUCTION 5922.11A

Subj: Pollution Law Enforcement

1. *Purpose.* This instruction promulgates guidance for the assessment of civil penalties pursuant to Section 311 (b) (6) of the Federal Water Pollution Control Act (FWPCA).

2. *Cancellation.* Commandant Instruction 5922.11 is cancelled.

3. *Discussion.*

a. It is Coast Guard policy that every reported or discovered discharge of oil be investigated and that every discharge in violation of Section 311 (b) (6) result in the assessment of a civil penalty.

b. In cases with extenuating circumstances, mitigation may be considered upon review and a compromise amount agreed upon. In those cases, the assessed penalty will become a matter of record as well as the compromise action taken.

c. In determining the amount of a penalty, only the factors set forth in the Act shall be considered. In this way, it is anticipated that the general level of penalties will be raised to a more meaningful level.

4. *Action.*

a. Enclosure (1) shall be used as the guideline for the assessment of a civil penalties pursuant to Section 311 (b) (6), FWPCA.

b. Information contained herein is intended to be used in conjunction with the National Contingency Plan as implemented by COMDTINST 3020.3 series.

/s/ J. D. McCann
J. D. McCANN
Acting Chief
Office of Marine Environment
and Systems

Encl: (1) Coast Guard policy for the application of Civil penalties under Section 311 (b) (6), FWPCA

Enclosure (1) to COMDTINST 5922.11A
23 FEB 1973

COAST GUARD POLICY FOR THE APPLICATION OF CIVIL PENALTIES UNDER SECTION 311 (b) (6), FWPCA

Consistent with the language of the Federal Water Pollution Control Act, Coast Guard policy requires the assessment of a civil penalty for each discharge of oil in violation of Section 311 (b) (3). A maximum penalty of $5,000 is authorized by Section 311 (b) (6); however, the drafters of the Act envisioned lesser penalties in certain circumstances. Section 311 (b) (6) provides that, "In determining the amount of the penalty . . . the appropriateness of the penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered . . ." That is to say that the penalty might be less than $5,000 for a small business, for a business which would be forced out of operation by the maximum penalty, or for a violation of minor gravity. It should be noted, however, that these factors are not to be considered in determining whether a discharge should be investigated or whether a penalty should be assessed. The statute requires that a civil penalty be assessed for each violation of Section 311 (b) (3).

It is Coast Guard policy to assume that the penalty will be at or near the maximum unless a lesser penalty is clearly justified by one of the factors listed in Section 311(b)(6).

A number of considerations may be made in determining the gravity of a violation, such as the degree of culpability associated with the violation, the prior record of the responsible party, and the amount of oil discharged. Substantial intentional discharges should result in severe penalties, as should cases of gross negligence, and so on. This is not to suggest that other considerations may not combine to determine the gravity of a violation.

Two factors should not be considered in fixing the amount of a civil penalty: (1) the responsible party's removal effort or expense and (2) a decision by Federal and/or state authorities to bring criminal action for the same discharge. Liability for a civil penalty under Section 311(b)(6) attaches at the time of discharge. It is entirely unrelated to the subsequent removal responsibility for which the discharger must bear the expense, either directly or by reimbursing the Pollution Fund. In no case may a responsible party avoid or reduce a civil penalty by removing the discharged oil. Federal or state criminal prosecutions for the same discharge do not affect the imposition or amount of a civil penalty. Criminal prosecutions are brought under separate authority such as the Refuse Act of 1899. They are neither intended as substitutes for civil penalties nor do they create a legal bar to subsequent civil penalties. Civil penalties should, therefore, be assessed for all violations of Section 311(b)(3) without regard to pending or anticipated criminal action.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-76-0303-E

Consolidated

L. O. WARD, PLAINTIFF

vs.

WILLIAM G. COLEMAN, JR., ET AL., DEFENDANTS

&

Case No. CIV-76-0456-E

UNITED STATES OF AMERICA, PLAINTIFF

vs.

L. O. WARD & L. O. WARD OIL & GAS OPERATIONS,
DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE
HONORABLE LUTHER B. EUBANKS

UNITED STATES DISTRICT JUDGE,
AND A JURY

ON MAY 9TH, 1977

IN ENID, OKLAHOMA

Reported by:

KEN COURTEMANCHE, C.S.R.

APPEARANCES

JONES & GUNGOLL, Attorneys and Counsellors at Law, P.O. Box 3339, Enid, Oklahoma, 73701, BY: MR. STEPHEN JONES, appearing on behalf of the Plaintiff in Case No. CIV-76-0303-E and appearing on behalf of the Defendant in Case No. CIV-76-0456-E.

MR. EARL SALO, United States Attorney, Department of Justice, Washington, D.C., 20530, appearing on behalf of the Defendant in Case No. CIV-76-0303-E and on behalf of the Plaintiff in Case No. CIV-0456-E.

* * * *

[43] THE COURT: If you want the exhibits all received at this time, we'll do it, or as you need them, at your election.

[44] MR. JONES: We have no objection to his exhibits and I believe he has none to ours, as to identification and authenticity.

THE COURT: What are the numbers of them, could you give us those?

THE CLERK: Plaintiff's 1 and 2 and Defendant's 1 thru 7.

MR. JONES: May I have just a minute, Your Honor?

THE COURT: Yes.

MR. JONES: Your Honor, we have no objection to the identification and authenticity of Plaintiff's 1, but because of the issues previously raised, which the Court is familiar with, involving the Fifth Amendment, we object to Plaintiff's Exhibit 1 on the grounds that it's in violation of the self-incrimination clause in that this is a criminal count—or civil count.

THE COURT: Very well. Let me make this observation to the Jury: I'm going to receive the evidence over the objection of the Defendant and at the same time conceding that in my opinion it's a very, very close question. That's a matter to be ruled on in connection with the Pretrial Motions, in order to protect his record, and to keep his position consistent, Mr. Jones must object to it.

MR. JONES: I have no objection to the other exhibits.

THE COURT: Fine. Government's Exhibits 1 and 2 will [45] be received. The Defendant's Exhibits 1 thru 7 will be received into evidence. Go ahead, Mr. Salo.

GARY SOBER

called as a witness on behalf of the Government, after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. SALO:

Q Would you state your full name, please?
A Gary Sober.
Q Where do you live, Mr. Sober?
A Right now I live in Edmond.
Q Could you give the address for the record?
A 3577 Wagonwheel Road.
Q All right. Where do you work, Mr. Sober?
A I work for the Oklahoma State Department of Health, Water Quality Division.
Q Do you have a title? A position?
A I guess it would be a Sanitarian or Environmental Technician.
Q All right. Do you have some degrees that qualify you for that position?
A I have a BS degree from Oklahoma State University.
Q In what subject?
A Wildlife Management and Zoology.
[46] Q When did you earn that?
A 1969.
Q And, do you have another degree?
A I have a Master's in Fisheries.
Q Fisheries?
A Yes.

Q Where did you earn that?
A At Oklahoma State.
Q What year did you receive that degree?
A '73, I believe.
Q All right. How long have you been working for the State Department of Health?
A I started in March of 1974.
Q All right. Could you describe your duties working for the State Department of Health?
A Well, when I was assigned to Garfield County, I was assigned as a Sanitarian, and my duties covered the field of water, air, solid waste, food, restaurant type inspections, we had some thirty-something programs that we cover here in the County.
Q All right. Now, have your duties included investigating spills of harmful substances into the water?
A When we are—When we are notified of these, our duties were to investigate these types of spills.
Q All right. Now, if I can take you back to March of [47] 1975, where were you assigned at that time, to work?
A I was in Garfield County, assigned to Garfield County.
Q All right. On March 25 of 1975, did you happen to observe an oil spill?
THE COURT: Excuse me, just a minute, Mr. Salo. Mr. Cloudd, you're the fartherest away, can you hear the witness all right, is he speaking all right?
JUROR CLOUDD: Yes.
THE COURT: Very well; go ahead.
Q (By Mr. Salo) On March 25 of 1975, did you happen to observe an oil spill as part of your work?
A March 25 of '75?
Q That's right.
A Yes.
Q Okay. Could you describe to the Jury how you happened to observe that spill?
A I was out at the Enid Landfill doing a routine inspection of the sanitary facilities. We have to do so many a year to check out on the program to see if they're putting their waste in right and covering it up and

there is a part that's open to the public where they have —they have really divided into two parts, one part for the City refuse and another part for people cleaning out their garages, or whatever, and take it over and dump it into this other part. As I was over there to check upon the clean-up operations and see how [48] much trouble they were having, and I noticed an oil tank car in an oil pit, just down to the South of this particular area, and there was some oil on the ground and I went down there further to investigate and this is where I first saw the spill. When I—When I confronted the man who—When I first saw the spill, I thought it was—that it was from maybe—maybe they were changing the oil from their heavy equipment out there and putting it into this site, and I went and approached the man who was in charge of the operation and I asked him about this and he told me that it was not his site and the City didn't have anything to do with it.
Q What man was that that you spoke to?
A This was Nolan Rich. I believe he's the Director out there, he's still out there, I believe.
Q All right. Can you describe now the spill that you saw?
A Well, it was coming out of the dike. I don't know how many of you are familiar with this type of oil retention pit, but if—It was probably eight to ten feet across and twenty-thirty foot long and they usually have—most of them generally have—you have a three foot above the level of the liquid in there to maintain, you need to maintain this level to keep the runoff and things in case you get a large amount of rain, to keep it from falling out. Well, this dike had—I noticed when I approached it on the East end of it, there was [49] more or less a V-notch cut in the top and it was about a foot, maybe a foot and a half deep, where it looked like somebody had taken something and cut the top of it out. You find this type in certain areas where they use—skim the top layer of water off and retain other things like if you have a sedimentation pond, a

lagoon system, domestic type waste. I noticed this because it was cut in such a way that it looked like it was done mechanically, and this is what brought me up to follow the trail of oil out of this site.

Q All right. So, you say there was a trail of oil leading from that notch?

A There was no oil flowing, there was oil-soaked ground, oil soaked in the ground where it had flowed out.

Q Did you follow that?

A I followed it down to this little creek. Well, it really—It was flowing water that was flowing down—As Mr. Jones says, it's a gully, but there was flowing water in this gully.

Q All right. How far was it from the pit down to the gully?

A Fixty, sixty feet, maybe more, it's really hard to say, hard for me to give an exact number.

Q All right. Did you observe any oil in the gully itself?

A Well, there was—Like I say, there was water flow-[50] ing through the gully at this time and there was oil at various points down the gully.

Q Was the oil on the surface of the water?

A There was oil on the surface of the water, also oil on some of the vegetation and plants surrounding it.

Q Did you follow the gully to see how far the oil went?

A Yes, we followed the gully and the course it took and there is areas where there might be a little buildup of water and there was oil there and you could follow it all the way on down into the creek.

Q That's into Boggy Creek?

A Yes, into Boggy Creek.

Q All right. Did you see signs of oil as far down as Boggy Creek?

A Yes, there was oil that was in Boggy Creek, in certain areas of Boggy Creek.

Q Did you see that on the surface of the water in Boggy Creek?

A You could see it on the surface of the water and there was some, oh, tree limbs and stuff like this that were in the Creek that had oil on it, and there was some oil on the sides of the bank.

Q All right. Did you follow Boggy Creek then to see how far the oil went?

A Yes, we followed Boggy Creek down to Sixteenth Street [51] and the oil ran out before Sixteenth Street. There was no signs of oil any farther than Sixteenth Street.

Q All right. Now, do you have anyway of knowing if earlier there had been signs of oil further down on Sixteenth Street?

A No.

Q All right. When you were investigating this path of oil, did you see any signs of salt that would have been deposited with the oil?

A It would be hard to say if—It would be hard to say, it was definitely from that.

Q Did you see salt at this time on March 25?

A There was a few places there that did show some salt deposits, but you couldn't—you couldn't bring any connection in—I couldn't tell where they came from.

Q I see. Could you describe the oil that we are talking about, could you be at all specific about how it looked?

A Well, to me it looked like waste oil, like after you would change the oil in your car and put it out somewhere, oil—It didn't have the dark color characteristics of crude as far as being raw crude oil, but it had characteristics of being oil that was—oh, diluted with water, you know, oil that has water in it and it would be sort of a milkier type of color than just what regular raw crude would be.

Q All right. Now, in your work for the Health Depart-[52]ment, do you regard spills of oil like the one you have just described as being harmful to the environment?

MR. JONES: I object to that as leading and suggestive and no proper foundation laid and the witness not qualified to answer such a question and is beyond the scope of the fact in this case.

THE COURT: Well, I think you may further qualify him in that regard, Counsel, but I will sustain it at the moment.

MR. SALO: All right.

THE COURT: On the basis that the witness has not been qualified.

MR. SALO: All right.

THE COURT. As an expert in that particular area.

Q (By Mr. Salo) Is it part of your job or has it been part of your job with the Health Department to do reports on spills of oil and other harmful substances?

A We get called in on various spills of what we call hazardous substances, whether it be acid or pesticides, oil, salt water type spills, cattle feedlot runoff, stuff like that. We get called in and usually our office is no more than an investigating type body that calls in other agencies and this is really all that we do, is go out and notify the people that these things have happened. As far as fish kills and stuff like this, the Wildlife Department was notified on these particular instances.

[53] Q In the academic work you did to earn your two degrees, did your studies include studying the effect of pollutants on fish or vegetation?

A My studies did not include any courses directly related to effects of pollution on fish. They were mainly in culture and environmental aspects.

Q All right. Have you had the chance to investigate oil spills where there were fish kills?

A Yes, I have.

Q So, are you familiar with the effect that oil and substances that are discharged with oil, the effects they have on fish, for example?

A Yes, in certain situations, I am.

Q All right. Could you explain what some of the effects of oil spills into water are?

MR. JONES: If the Court please, I'm going to object to that unless it can be shown that such effects were present here or unless there is something about Boggy Creek, detective water from the Atlantic Ocean to the Gulf of Mexico or the Great Lakes—That's too broad a

question, is the basis of my objection. It's not properly framed for the facts of this case.

THE COURT: Would you rephrase it, Counsel?

Q (By Mr. Salo) All right. Well, did you see any specific harmful effects of this oil spill on either—on [54] vegetation, for example?

A There was—I observed no fish kill.

THE COURT: Well, he said vegetation.

THE WITNESS: Vegetation.

THE COURT: That was his inquiry, did you see any harmful effect on vegetation?

THE WITNESS: Harmful effects on vegetation. You would have to go with—a long-lasting effect or a temporary effect or what? There were no long-lasting effects, harmful effects on the vegetation.

Q (By Mr. Salo) All right. Now, you told us how you followed the oil, evidence of it as far down as Sixteenth Street. In your experience in investigating oil spills, will some of the oil continue on down the stream and yet remain undetected?

MR. JONES: If the Court please, that's too broad a question. It assumes facts not in evidence and I think we are entitled to know what did happen, not what might have happened in the absence of other evidence.

THE COURT: I think he may show what he saw, tell the Jury, go ahead, what you saw.

THE WITNESS: Like I say, I had—past Sixteenth Street, I observed no oil on either the banks, vegetation or any types of debris, other debris that was in the Creek, so I cannot say that it went on down or it didn't.

[55] Q (By Mr. Salo) All right. Now, I would like to show you this document which is marked Plaintiff's Exhibit 1. Have you seen that document before?

A Yes.

Q Could you tell us what it is?

A It's a report that Mr. Ward filled out to send to the Environmental Protection Agency.

Q Is that the report on the spill that you have been describing for us?

A Yes.

MR. SALO: All right. I have no more questions, Your Honor.

THE COURT: You may cross examine, Mr. Jones.

* * * *

[69] THE COURT: So, we'll hear the Defense witnesses now. You may call your first witness for the Defendant.

MR. JONES: The Defendant calls Curly Corwin.

B. V. CORWIN

called as a witness on behalf of the Defendant, after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. JONES:

Q Would you state your name for the Court and Jury, please, and spell your last name for the Reporter?

A B. V. Corwin, C-o-r-w-i-n.

Q Do you have a nickname, Mr. Corwin?

A Yes, I do, Curly.

Q What is it?

A Curly.

Q Now, would you be sure to speak up loud enough so all the members of the Jury can hear you, the Court and Mr. Salo, the Government's Counsel, sitting here at the first table. Where do you live, Mr. Corwin?

A I live in Enid, 2135 Sundown Circle.

Q What is your principal occupation?

A I am in the oil field service business.

Q How long have you been in that line of work?

A For eighteen years.

[70] Q In March of 1975, were you connected in anyway with the oil lease known as Blansit #2, of L. O. Ward?

A Yes, sir, I was.

Q And, where was that lease?

A That lease is approximately three-quarters of a mile South of what is now on Garrett Road in Enid, and a quarter of a mile East.

* * * *

[77] Q All right, sir. You may return to your seat, sir. Mr. Corwin, during the latter part of March of 1975, did you have occasion to talk with anyone from the Health Department?

A Yes, sir, I did.

Q Do you recall who you talked to?

A I don't recall the name, no.

Q Do you recall when it was?

A Yes, it was March 25.

Q All right. Would you explain to the Court and Jury, please, how it was that you happened to some in contact with this gentleman from the Health Department?

A One of the office personnel from Mr. Ward's office called me on my mobile phone and asked me if I would return a call to this member of the Health Department, that he wanted to talk to me.

Q All right, sir. Did you do that?

A Yes, I did.

Q All right. Now, what did this gentleman tell you, just in substance, not the exact conversation, but what was he calling about?

A He called to tell me that one of Mr. Ward's wells that I was looking after had an oil spill.

Q What action, if any, did you take after that conversation with the official of the Health Department?

[78] A I don't ever recall talking to him again, it's possible I did.

Q No, I mean after you talked to him that day on March 25, 1975, what did you do?

A Well, I immediately proceeded to the location to survey the damage.

Q All right, sir. When you got there, what did you observe?

A I walked the draw, so to speak, from the location back to Boggy Creek and there had, in fact, been some oil run-off of the location and down that draw.

* * * *

[80] Q Now, after you made an examination of the site, what [81] anything, did you do?

A Well, as I recall, I immediately called a bulldozer and a vacuum truck and a crew of roustabouts and proceeded with cleanup operations, to try to clean up as much of it as possible.

Q Okay. Now, what did you do at that time, when you say you cleaned it up?

MR. SALO: Your Honor—

THE WITNESS: Well, I took a bulldozer—

MR. SALO: For the record, I would like to preserve our objection that the cleanup is irrelevant to the civil penalty.

THE COURT: Yes, the objection will be overruled, in view of the Court at this moment, that may not be an issue for the Jury, it might be to the Court with regard to any mitigation, should ultimately the decision be reached for the Defendant. The objection is overruled. You may answer.

Q (By Mr. Jones) Tell me what you did to clean it up.

A Well, the first thing I done was to take the bulldozer and I constructed a dam in the area of the road, close to Boggy Creek, earth and fill, to prevent anything from going—should any reason it decide to rain or anything like that, to prevent it from going on down into the Creek, and we proceeded with our cleanup operations from there backwards from the well with a vacuum truck, trying to pick up all of the [82] visible oil and clean it up in anyway possible.

Q All right. Now, was Mr. Ward present during this cleanup operation?

A I don't recall Mr. Ward being there.

Q Do you know where he was?

A I don't recall right at the minute. He was on another well somewhere, if I remember correctly and I proceeded with the cleanup operations in lieu of him being there immediately.

Q Now, how long did you spend on these cleanup operations, Mr. Corwin?

A As I recall, I spent a portion of the 25th, all day the 26th and a portion of the 27th.

Q Did you personally observe any further cleanup operations?

A Yes, I did. At that time, due to my work schedule, Mr. Ward had some of his company personnel come in and take over the cleanup operations and I merely drove by daily and offered my assistance or whatever.

Q What did you observe that they did, if anything?

A Well, they—they cleaned up every drop of oil up and down that draw from all the way—

Q Now, after you constructed this earth dam, did any other oil go past it?

A Not to my knowledge.

Q At anytime from the time you go out there, through [83] the cleanup period, did you ever see any sheen or discoloration of Boggy Creek caused by any weathered oil from the shale pit?

A No, sir, I didn't.

Q Now, did you see any evidence that, prior to your being there, that any of this substance had entered Boggy Creek?

A No, sir.

Q Did you observe any damage to the immediate environment?

A Do you mean up and down the draw?

Q Well, let's go first to Boggy Creek and then the draw.

A No, I don't believe any of it ever reached—arrived at Boggy Creek.

Q Now, when you were out there several days later, was there still water in the gully?

A Yes.

Q When the cleanup operation was completed, was there any visible sign of the oil?

A No. I thought they done an exceptional job of cleaning it up.

Q Have you, in your eighteen years of experience in the oil field business, seen cleanup operations of other similar spills?

A Yes, sir, I have.

Q And, approximately how many have you seen?

A That's—It would be very numerous—I don't keep [84] track, but probably a hundred.

Q What was your opinion of the cleanup operation or what is your opinion of the cleanup operation out here at this site?

A Well, actually, I think Mr. Ward probably spent more money and time and effort on that one than the average, the ones I've been involved with.

MR. JONES: If I may approach the witness, Your Honor?

THE COURT: Surely.

Q (By Mr. Jones) Mr. Corwin, I will hand you here what previously has been received into evidence as a series of photographs, marked and identified as Defendant's Exhibits 1 thru 6, and ask you, please, if you would look at Defendant's Exhibit 2 and tell the Court and Jury, please, what that is, what does that picture show.

A This is the Blansit #2 location standing South of the well head looking back North down the draw in question on the right-hand side of the map.

Q All right. Now, that is a recent photograph, is it not?

A Yes, that has been since the reserve pit and all the pit areas have been filled.

Q All right. So, now, just show the Court and Jury on this picture, if you can, where this pit was.

[85] A You can see—

THE COURT: Why don't you stand over there in front of them. I'm afraid they can't see much from where you are. Just step over there and point it out to them. Counsel, if you want to look—

THE WITNESS: If you will look in the photo, you can see a different color of dirt running along at the base of where this man is standing and down to this area right here (indicating). The reserve pit is approximately 125 foot square and it would be in this (indicating) area of the top of this hill that you see right there (indicating), the gray, the gray area.

Q (By Mr. Jones) Okay. Where is shale pit?

A It would be right where this (indicating) man is standing, right there (indicating).

Q All right, sir. Now, I hand you, Mr. Corwin—

THE COURT: I'm afraid you might be blocking the view of someone.

Q (By Mr. Jones) I will hand you Defendant's Exhibit No. 5 and ask you, sir, what that is?

A That is a picture standing on the corner of the location, it would be back North and East of the well head and looking down the draw.

Q All right. Now, where is the gully or draw in that picture?

[86] A It's very distinct right down through the middle of the picture. You can see it right down through the middle of the picture.

Q Now, I will hand you, Mr. Corwin, Defendant's Exhibit 3 and ask you, sir, what that picture depicts?

A Okay. This would be the draw area, I would say two to 300 feet, right before you go into Boggy Creek. You can see the road I diagramed right there (indicating), it runs right by that big tree, the City's little access trail to get to the back of their property. You can see it right at the edge of the Creek there (indicating).

Q All right. Now, this was a recent picture, but is this vegetation and what you see there, is that essentially the same as what it was in March of '75, have there been any trees cut down or anything there that you can remember?

A No.

Q All right. Now, I will hand you, Mr. Corwin, Defendant's Exhibit 6, and ask you what that picture depicts?

A This is a portion of the draw, just a short area of the draw that the spill occurred in.

Q And, Defendant's Exhibit 1?

A This looks like the draw immediately where it dumps into Boggy Creek, I would say Boggy Creek would be maybe 25 feet on the other side or between 25 and 50 feet on the other side of this big log. That's looking North down the draw.

[87] Q And, Defendant's Exhibit 4?

A Well, this would be a portion of the same area. This draw goes down into Boggy Creek, this (indicating) is trash from the dump and whatnot, laying in the bottom of that draw, I believe.

Q All right, sir. You may resume your seat, sir. Mr. Corwin, who built the pits out there?

A They were—Mr. Ward contracted Corwin & Hauth, Incorporated, a dirt construction company, which I own part of it.

Q So, your company built the pits?

A Yes.

Q You're sure there was no dike or retaining wall around this shale pit?

A I'm sure there wasn't, yes.

MR. JONES: I have nothing further. Thank you, sir.

THE COURT: All right. You may cross examine.

CROSS EXAMINATION

QUESTIONS BY MR. SALO:

Q Mr. Corwin, those—the photograph that we looked at, those are recent photographs, is that right?

A I believe so, yes.

Q When you were showing the area where the oil spill had been, do these photographs give an accurate picture of what the area looked like at the time you discovered the oil [88] spill?

A Yes, I would say the draw prior to the oil spill looked a good deal like that, yes.

Q I'm referring more specifically to what the ground looked like in the area, does that give an accurate impression of the appearance of the ground after the oil had been spilled?

A Yes, with the exception of the pit areas, it has changed—the pits have been back-filled and leveled off and that photo isn't like it was at that time, but the rest of them I think are, yes.

Q Isn't it true that when you first went out, you observed oil on the ground, it was apparent?

A Yes, sir, I did.

Q That does not appear on the photographs?

A No, it does not.

Q In that sense, they don't give an accurate impression of what that area looked like in terms of the oil?

A Well, I was speaking prior to the day of the oil spill, I think that describes the area.

Q I'm sorry. Then, as of the time of the spill, when you went out to observe it, then, you would say these do not give an accurate impression of the appearance of the area where the spill had occurred?

A Well, there is no oil in the photographs and there was oil on the ground the day I went out and observed it, yes.

[89] Q All right. Now, as to rainfall that occurred prior to the time that you investigated the oil spill, did you say it was your impression that there had been rainfall shortly before or immediately before the discharge?

A Well, during the course of drilling of that well, I distinctly remember having bulldozer equipment called over there to pull trucks in and out, which would have been prior—thirty days prior to the spill, during the course of the drilling and completion operations, we had bulldozers over there to pull trucks in and out, so it had to rain.

Q When would you say that period of time began, when you're speaking about, when you needed to have bulldozers?

A It would have been probably in the first part of March.

Q Can you remember a specific date when these operations began?

A No, I can't.

Q All right.

A I could possibly go back to the records and get invoices and produce that information, if it is necessary, I can do that.

Q Is it possible that the largest rainfall in that period occurred, say a week before this spill?

A Yes, it's possible.

Q Do you have any recollection as to whether there was much rainfall in the several days, say three or four days before the spill?

A. I don't recall it raining three or four days before the spill, no.

MR. SALO: All right. Could I have one second?

THE COURT: Surely, surely.

MR. SALO: I have no further questions.

* * * *

[135] THE COURT: Would you hand the Verdict or Interrogatory rather, that has been answered up? All right. The Interrogatory is properly answered. We'll ask the Clerk to please read it.

THE CLERK: In the United States District Court for the Western District of Oklahoma, L. O. Ward, Plaintiff, versus William G. Coleman, Jr., individually, and as Secretary of Transportation, et al, Defendants, Case No. 76-0303-E and the United States versus L. O. Ward and L. O. Ward Oil & Gas Operations, Defendants, Case No. 76-0456-E, Interrogatory, We, the Jury, duly empaneled and sworn in the above styled cause, do upon our oath find as follows: That oil did flow in a visible quantity from the draw on the L. O. Ward lease into Boggy Creek, signed by Guy W. Chapman, dated May 10, 1977.

THE COURT: All right. Ladies and Gentlemen, you have heard the reading of the answer to the Interrogatory and since under the law it must be unanimous, the answer that is, I will poll the Jurors individually. Does the Juror Clarence Cowan agree to the answer to the Interrogatory?

JUROR COWAN: Yes.

THE COURT: Mary Sipe?

JUROR SIPE: Yes.

THE COURT: Edward Parma?

JUROR PARMA: Yes, sir.

[136] THE COURT: Verla Gleason?

JUROR GLEASON: Yes, sir.

THE COURT: Yes?

JUROR GLEASON: Yes.

THE COURT: Arthur Pliner?

JUROR PLINER: Yes.

THE COURT: And, Mr. Chapman, you're the Foreman?

JUROR CHAPMAN: Yes.

THE COURT: Thank you very much, Ladies and Gentlemen. You're going to be excused in a moment, but I thought I would explain just briefly to you now what reduced the case down to such a simple question, because you Jurors are entitled to know and you're also entitled to know the impact of the decision that you made when you answered the Interrogatory. If you recall, I started out telling the Jury there may be five questions that were involved, first of all, one, was there an oil spill, well, there was no dispute in that, everybody agreed to that, that was not a question to submit to the Jury; number two, that whether or not the spill emanated from the Defendant, and there wasn't any dispute on that, everybody agreed that was right; and third, that said spill flowed into a navigable stream. Now, that was a dispute because I think the Congress meant anything—if it had of gotten as you said it did, into this Boggy Creek, then it goes on from there into the other creek and finally, I believe, Skeleton Creek, and [137] from there to the Cimarron River and then to the Arkansas. And, if that was not the intent of Congress, then, we could spill oil all over practically this whole Country and the Act would not apply, if indeed we had to go direct into a navigable stream, but if it had been headed off at the pass, so to speak, before it ever got to that Creek, I was prepared to hold that this draw is not a navigable stream, by law. Now, four, the question that the spill was of a harmful quantity as defined by the Regulations, now, we learned by the Regulations of what we call a sheen test and that was part of what I defined to you when you asked that question. A sheen test, in common language, means something that is visible by the naked eye and if it can be seen by the naked eye, the Congress has seen fit to say that's a harmful quantity and last, the fifth question, the penalty, as assessed was a reasonable sum and that is for me to determine, and I will determine that in a

few moments. You, Ladies and Gentlemen, may be excused, thank you very much, we appreciate your splendid service during this session of Court. The parties will remain momentarily so we can complete the record, but the Jury may be excused.

(Whereupon, at this point the Jury was excused, after which time the following proceedings were had, to-wit:)

THE COURT: Now, the sole question left is whether or not the civil penalty imposed in connection with this matter [138] was a reasonable sum. Of course, the Court permitted evidence on that point to come in so we could hear the whole thing and that's in the record, and I'm going to reduce the amount of this penalty for the reason that I am convinced that the Defendant did do nearly everything that was possible to alleviate the situation after it was discovered, and because of that, and because of the fact that there was not a great deal of oil that did escape, I'm going to cut the penalty exactly in half, make the penalty $250.00 rather than 500.00. It was suggested to me that I cut the fine or penalty, rather civil penalty, down to a dollar as was done in a case involving General Motors. I don't believe we have an analogous situation here because there the evidence was and the Judge found that General Motors had done everything possible to prevent the pollution as Congress distinguished between trying to clean it up after it occurred. I'm not about to say Mr. Ward is a bad operator or a bad man. I'm convinced he's going to be a good man. We are going to have to be more careful with this wonderful land of ours and do everything humanly possible to prevent these things to start with, otherwise we are all going to be reading Silent Spring, and maybe there will be no Spring at all for our grandchildren. Now, this is a law that I am happy to help enforce and it must be enforced and the teeth that enforce it must indeed be long and sharp ones, so by reducing this fine, Mr. Jones, as you suggest, to a dollar, I believe I would be [139] saying to the industry, here in Oklahoma that actually is not that bad, go ahead and instill this deleterious sub-

stance, kill our fish, kill our streams, pollute the waters, kill the land, because we are so energy conscious that we don't care what you do. I just don't want that message to go forward, at least from here. That's the reason I am not going to impose that minimum, minimal one dollar penalty. It will be $250.00.

Now, I'm going to ask that Counsel for the Government prepare a formal Judgment in accordance with the way we have conducted this Trial, the finding of the Jury with respect to the Interrogatory in Case No. CIV-76-0456-E, that's the one styled United States versus L. O. Ward, that's the civil action to collect the penalty. And, when you have prepared it, I want you to submit it to Counsel for the Defendant for approval as to form, and then have it forwarded on to me for signature and filing and get this done within a week. I would also require that you do the same thing in the other case, but Mr. Jones indicated that he would prefer to prepare that himself, because he may want to appeal. Of course, he may appeal both of them, but the one that found the Statute to be Constitutional, didn't you indicate you would prefer to draw that one yourself?

MR. JONES: Yes, Your Honor, and enter judgment in favor of the Defendant in Ward versus Coleman.

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SUPREME COURT OF THE UNITED STATES

No. 79-394

UNITED STATES, PETITIONER

v.

L. O. WARD, dba L. O. WARD OIL and GAS OPERATIONS

ORDER ALLOWING CERTIORARI. Filed November 5, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

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